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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED ARTISTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE M. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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STATEMENT

On February 8, 1950, after years of antitrust litigation,[1] the United States District Court for the Southern District of New York entered a consent decree against petitioner that forbids certain practices in the licensing of movies (J.A. 17-19).[2]

[1] See *United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53 (S.D.N.Y. 1947), aff'd in part, 334 U.S. 131 (1948), on remand, 85 F. Supp. 881 (S.D.N.Y. 1949).

[2] Consent decrees were at other times also entered respecting other parties. See, *e.g.*, *United States* v. *Loew's Inc.*, [1950-1951] Trade Cas. (CCH) ¶¶ 62,765, 62,861. ("J.A." refers to the appendix filed in the court of appeals. We lodged a copy of

Paragraph V 1. of the decree, the "visitation" provision, gives the United States access, on reasonable notice and subject to claims of privilege, to documents under petitioner's control for the purpose of monitoring compliance (J.A. 20). The decree permits the United States to interview petitioner's officers and employees and to require it to submit reasonable reports necessary for the government's oversight function (*ibid.*). Section V 2. states that information obtained by visitation may be divulged in the course of other legal proceedings to which the United States is a party, or as otherwise required by law (J.A. 21). The district court retains jurisdiction to enforce the decree and to punish violations (*ibid.*). Nothing in the decree, however, limits the government's traditional prosecutorial discretion in investigating willful violations.

The United States has used the visitation provisions many times to investigate complaints by third parties that the decree had been violated. In most instances it has determined that the charges did not merit further investigation and has dropped the matter without resort to civil or criminal proceedings.

On March 21, 1977, the Antitrust Division notified petitioner that the United States had received a complaint that petitioner was violating the consent decree in the licensing of the film "A Bridge Too Far" (J.A. 23, 61). As is its custom, the government tried to resolve the matter preliminarily through the visi-

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the appendix with the Clerk of this Court in connection with an application for a stay, No. A-856.)

tation procedure. "In order to evaluate the circumstances" it requested "a list specifying each theatre in the country which received a license for the opening run" of that film (*ibid.*). On April 5, 1977, pursuant to mutual agreement and without any assertion of privilege, petitioner submitted a list of theaters to which, as of that date, it had licensed the movie for exhibition in June 1977 (J.A. 61).

On May 6, 1977, Assistant Attorney General Baker requested "access to inspect and to copy all documents" relating in any way to the licensing of "A Bridge Too Far" in four geographic areas (J.A. 55, 61). He stated that "[i]f any documents [were to be] withheld on the basis of privilege," petitioner should "supply * * * a list of documents withheld together with the basis for the claim of privilege" (J.A. 55). On July 8, 1977, Gerald Phillips, petitioner's vice-president and general counsel, delivered copies of some 570 requested documents to the Department (J.A. 61, 69). On August 4, 1977, Phillips also transmitted copies of two of petitioner's licensing agreements to the United States (J.A. 62). On neither occasion was any assertion of privilege made.

Lawyers from the Antitrust Division then interviewed Arthur Reiman and James R. Velde, two of petitioner's officials.[3] Reiman, the administrative assistant to the senior vice president in charge of domestic distribution at the time of the licensing of "A

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[3] The Division decided not to interview any additional persons and thus did not pursue the request (see J.A. 62) to interview 11 of petitioner's officials.

Bridge Too Far," was interviewed at petitioner's office in New York City on March 15, 1978, concerning the accounting procedures used in licensing the film (J.A. 62-63). Velde, the senior vice president in charge of domestic distribution at the time of the licensing, was interviewed in the Department of Justice's Washington offices on August 23, 1978 (J.A. 63). Phillips and Michael Rappaport, an attorney employed by petitioner, were present at both interviews. Neither Reiman nor Velde was questioned under oath or asked to execute a sworn statement (*ibid.*). Neither asserted any claim of privilege.

The information obtained through the visitation process was thought to merit further investigation, and the United States decided to present the possibility of a criminal violation of the consent decree to a grand jury for its investigation. The grand jury, empanelled on December 19, 1978, served petitioner with a subpoena duces tecum (J.A. 63-64). Petitioner asked the consent decree court to quash the subpoena on the ground that, because the United States had obtained information pursuant to the visitation clause, it could proceed only under the consent decree by a petition for contempt and could not ask a grand jury to return an indictment.

The district court heard oral argument on February 15, 1979, at which time petitioner indicated that it was willing to turn the subpoenaed documents over to the United States if the United States brought its criminal contempt charges before the district court under Fed. R. Crim. P. 42 (J.A. 70, 88-89). The district court found that petitioner simply wanted to create unjustified obstacles to the grand jury's investigation (J.A. 94) and denied the motion. The court also denied petitioner's request to certify the ruling for appeal under 28 U.S.C. 1292(b), but it stayed the order enforcing the subpoena for five days pending appeal.

On February 20, 1979, the court of appeals extended the district court's stay pending expedited consideration. After full briefing and argument, the court of appeals dismissed the appeal on March 20, 1979, for lack of jurisdiction (Pet. App. 1-3). On March 26, 1979, it granted the United States' motion for immediate issuance of mandate and dissolution of the stay.[4]

On March 29, 1979, petitioner turned over approximately 20,000 of the documents that were subject to the subpoena. On April 9, 1979, Mr. Justice Marshall denied an application for a stay. Petitioner thereafter turned over another 40,000 documents, which it represents to be the balance of those required by the subpoena.

ARGUMENT

This case is moot. Petitioner has complied with the subpoena, and that brings to an end any dispute about whether compliance could be compelled. See, *e.g.*, *Barney* v. *United States*, 568 F.2d 116, 117 (8th

[4] On March 28, 1979, the court of appeals, considering petitioner's letter of counsel and memorandum in opposition to the United States' motion, confirmed its order directing the mandate to issue.

Cir. 1978); *Kurshan* v. *Riley*, 484 F.2d 952, 953 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). If, in the future, petitioner deems it necessary to contest the use of any materials it has produced, it may do so at that time. See *United States* v. *Lyons*, *supra*, 442 F.2d at 1145-1146.

As we have argued in previous cases,[5] the appropriate disposition in this Court of a case that becomes moot after the decision of the court of appeals depends on whether the question presented by the petition independently would call for review. If the question is of substantial importance, the Court should grant the petition and vacate the judgment below, in order to deprive the judgment of precedential significance. But if the question presented would not have called for review (were the case not moot), the Court should simply deny the petition. In this case, we submit, it should deny the petition.

The only question presented by the petition is whether the court of appeals erred in dismissing the appeal for lack of jurisdiction. Petitioner contends that the denial of its motion to quash a grand jury subpoena duces tecum before the district court is an order subject to review at this stage in these proceedings. Petitioner is wrong. As this Court held in *United States* v. *Ryan*, 402 U.S. 530 (1971), the

[5] See *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978). We have furnished a copy of our memorandum in that case (No. 77-900, October Term, 1977) to counsel for petitioner.

denial of a motion to quash a grand jury subpoena is not an appealable order.[6] See also *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *In re April 1977 Grand Jury Subpoenas* (*General Motors Corp.*), 584 F.2d 1366 (6th Cir. 1978) (en banc), cert. denied, No. 78-739 (Feb. 26, 1979). If petitioner had concluded that review of its legal arguments before complying with the subpoena was imperative, it could have stood in contempt of court and appealed from any sanction that was imposed. That is what the Sixth Circuit held in *General Motors*, in which the Court recently denied review.[7] There is no greater reason to grant review here.[8]

[6] Petitioner's contention that its motion to quash was only ancillary to its request that proceedings be conducted, if at all, by criminal contempt petition (Pet. 7-9) is unsupported by the record. The motion that the district court denied is titled: "Motion to Quash Grand Jury Subpoena Duces Tecum" (J.A. 1). Petitioner's counsel, at the start of his argument before the district court, also described his motion as one to quash a grand jury subpoena (J.A. 68). At all events, denial of a motion to conduct the proceedings under Rule 42 also is not appealable. There can be full review if an indictment is returned and if petitioner should be convicted. See *United States* v. *MacDonald*, 435 U.S. 850 (1978).

[7] In *General Motors* the complaining party refused to comply with a subpoena because, it said, the grand jury proceeding was fatally tainted by the presence of an attorney employed by the Internal Revenue Service. It sought to use its objection to the subpoena as a means of testing the lawfulness of the investigation. Here petitioner seeks to use its objection to the subpoena to test the lawfulness of proceeding by indictment rather than by citation for contempt of the consent decree. The situations are identical in all respects that are material to the question of appellate jurisdiction.

[8] Petitioner's reliance on *Perlman* v. *United States*, 247 U.S. 7 (1918), is unwarranted. As the Court explained in *Ryan*,

At bottom, petitioner wants the grand jury investigation halted and the case brought by a citation for contempt of the consent decree.[9] But the denial of a motion to halt a grand jury investigation is not a final order. It does not finally dispose of any legal issue, and it is not unreviewable on appeal from a

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the earlier case involved documents in the hands of a third party. The person resisting disclosure had no practical way to test its arguments save on appeal. Here, by contrast, the documents have been sought from the hands of the person that objects to disclosure. Petitioner was free to refuse to disclose and to be cited for contempt; only the absence of that option led to the finding of appellate jurisdiction in *Perlman*. (Now, of course, petitioner has complied with the subpoena and cannot recall the documents. This, however, makes the case moot; it does not create appellate jurisdiction. Petitioner had the option of standing in contempt, and it cannot retroactively manufacture appellate jurisdiction by declining to exercise its option.)

[9] Petitioner's argument on the merits conflicts with the principle that contempt of a judicial decree may be prosecuted either by indictment or by proceedings under Fed. R. Crim. P. 42. See *Green* v. *United States*, 356 U.S. 165, 187 (1958); *United States* v. *Wilson*, 421 U.S. 309 (1975); *United States* v. *Morales*, 566 F.2d 402 (2d Cir. 1977); *Steinert* v. *United States District Court*, 543 F.2d 69 (9th Cir. 1976). Petitioner's reliance on *In re Amalgamated Meat Cutters*, 402 F. Supp. 725 (E.D. Wisc. 1975), for the proposition that criminal contempt may not be prosecuted by indictment is incorrect. It does not stand for that rule, and the Seventh Circuit allows proceedings in either form. *United States* v. *Eichhorst*, 544 F.2d 1383 (1976). Nothing in the consent decree purports to limit the prosecutor's options if he uses the visitation powers. To the contrary, the decree provides that information so obtained can be used for any lawful purpose. It cannot reasonably be doubted that presenting incriminating information to a grand jury is a lawful purpose.

final judgment. If the grand jury should return an indictment, and if petitioner should be convicted, it could raise on appeal its argument that a citation for contempt under Fed. R. Crim. P. 42 was the only permissible form of proceeding against it. If the appellate court accepted that argument, it could reverse the conviction. Petitioner's desire to avoid the travail of investigation and trial does not make the order appealable. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30 (1943); *United States* v. *MacDonald*, 435 U.S. 850, 858-861 (1978); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The fact that petitioner's motion to quash was filed before the judge responsible for supervising the consent decree rather than the judge responsible for supervising the grand jury does not make the order any more "final"; it instead simply indicates that petitioner sought relief from the wrong judge.[10]

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[10] Petitioner is not assisted by *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963), modified, 375 U.S. 994 (1964). There was appellate jurisdiction in that case because the district court had resolved every issue presented and settled the dispute. Nothing was left to be litigated. Here, by contrast, the grand jury proceeding is ongoing and may be followed by a trial.

CONCLUSION

The petition for a writ of certioari should be denied.

Respectfully submitted.

WADE M. MCCREE, JR.
Solicitor General

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